Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

JACQUELINE PADDIO,
PETITIONER

v.

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the presence of two blacks on a jury panel precludes the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether counsel's statement that he did not "think that it is appropriate for us to discluse to the court why we chose a juror" requires a finding that it was in fact based on race, pursuant to this Court's decision in *Hernandez v. New York,* 111 S.Ct. 1859 (1991)?

3. Whether the striking a black venire persons for reasons and under conditions that similarly situated white venire persons are not struck violates the Equal Protection Clause of the 14th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Board of Trustees for State Colleges and Universities; Dr. G. Warren Smith, individually and in his capacity as President, Southeastern Louisiana University; Dr. Robert Butler, individually and in his capacity as Vice-President, Southeastern Louisiana University; and Thomas Douple, individually and in his capacity as Director of Athletics, Southeastern Louisiana University.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO.

JACQUELINE PADDIO,

PETITIONER

v.

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,

RESPONDENTS

PETITION

Jacqueline Paddio petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on December 1, 1993.

OPINIONS BELOW

The opinion of the court of appeals (93-3093 Pet. App. 1a) is not reported. The opinion of the district court (91-42277-"N"(MAG 3) Pet. App. 2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution privides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner, Jacqueline Paddio, commenced an action in the United States District Court for the Eastern District of Louisiana on the 20th day of November, 1991, pursuant to 20 U.S. §§ 1681, *et seq.*, 42 U.S.C. §1983, and the First and Fourteenth Amendment to the United States Constitution. Petitioner charged defendants, Board of Trustees for State Colleges and Universities, Dr. G. Warren Smith, Dr. Robert Butler and Thomas Douple with: (1) relieving her of her duties and responsibilities as head coach of the volleyball and softball teams, because of her race and/or sex and/or in retaliation for having spoken out against and filing a lawsuit complaining about defendants' unlawful employment practices, and (2) denying her the same employment opportunities, benefits, compensation, terms and privileges of employment as the other head coaches, because of her race and/or sex and/or in retaliation

for having spoken out against and filing a lawsuit complaining about defendants' unlawful employment practices.

2. The trial of the matter was tried before a jury of seven (7) persons, commencing on February 1, 1993, and continuing through February 4, 1993.

3. At the trial of this matter, each side was permitted three (3) peremptory challenges. Defendants exercised their peremptory challenges to exclude Lorraine Beaulieu, black female, Joe Dugas and Horace Golden, black males. Petitioner interposed a timely objection to the striking of these jurors, alleging that they were exercised solely on racial grounds.

4. The Honorable Lance Africk, Magistrate Judge, asked counsel for defendant to articulate the reasons for his rejection of the three (3) black venire persons. (Pet. App. 3a) Counsel responded by stating:

> Judge, in all due respect, I don't think it is appropriate for us to disclose to the court why we chose to excuse a juror. I would like to point out in response to counsel's motion that we accepted two black jurors before we exercised any challenge for black jurors. (Pet. App. 3a)

5. Upon being advised by the court that he was in fact required to state the reasons therefor, counsel articulated the following reasons for striking Ms. Lorraine Beaulieu:

> We thought Ms. Beaulieu's background and education and apparent level of sophistication was below what was needed to understand the issues in this particular case. She's a housewife. She is not involved in the workforce. She doesn't understand employment. She does not have any reason to understand the goal of higher education. And we felt that's not the kind of juror that we need in this case. (Pet. App. 4a)

6. The characteristics deemed by counsel to be objectionable in Ms. Beaulieu were not possessed by her but instead by two (2) Caucasian females, whom he found acceptable. Ms. Beaulieu was not a housewife, and she was employed. (Pet. App. 5a) The two (2) Caucasian females, Mrs. Gail Couvillion (Pet. App. 5a), and Mrs. Diane Baldock (Pet. App. 6a), were unemployed housewives.

7. The Court, over petitioner's objections, concluded that petitioner "failed to establish a prima facie showing that the peremptory challenges were based on race [because] there are two blacks on the jury panel." (Pet. App. 7a) The court further stated that "based on the explanations given I don't find the challenges made were pretextural." (Pet. App. 7a)

8. The case proceeded to trial on February 1, 1993, with a jury panel consisting of five (5) Caucasians and two (2) black jurors. A verdict was returned on February 4, 1993, in favor defendants, and against petitioner. Judgment was rendered on February 5, 1993, dismissing petitioner's complaint. (Pet. App. 2a)

9. Petitioner filed a timely appeal of the verdict to the United States Court of Appeals for the Fifth Circuit. On appeal, petitioner raised and briefed the following issues:

> a. Whether defendants exercised their peremptory challenges in a way such as to exclude blacks, in violation of the Equal Protection Clause of the Fourteenth Amendment?
>
> b. Whether defendants' reasons for the employment actions taken against plaintiff were pretextual and whether the motivating reasons were race and/or sex?
>
> c. Whether defendants refused to renew plaintiff's contract to coach softball as a result of the lawsuit filed by her contesting her removal as coach of the volleyball team.

10. In a decision dated December 1, 1993, the Fifth Circuit, in a per curiam opinion, concluded:

> "... there is no error in the district court's determination that the defendants presented adequate reasons for their exercise of peremtory challenges and that those reasons were not pretextural. We also conclude that the district court did not err in entering judgment on the jury verdict." (Pet. App. 1a)

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided ques-

tions of considerable public importance in a manner that expressly conflicts with decisions of this court and other courts of appeal. By affirming the district court's determination that the presence of two (2) black jurors precluded the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges, the appeals court disregarded the command of this court to eradicate, not merely minimize, racial discrimination in jury selection. Further, in affirming the district court's finding that defendants' reasons for the use of their peremptory challenges was not pretextural, the appeals court disregarded this Court's instruction regarding the best method of determining pretext, to wit: demeanor of counsel. Finally, the Third and Eighth Circuits adopt the position that a race neutral explanation is incompatible with the rejection of black venire persons for traits which, if possessed by white venire persons, would not serve as grounds for rejection. The position of the Fifth Circuit, as evidence by this case, appears to be in conflict with those two circuits.

The questions presented herein will recur with regularity since most federal trials, particularly in urban settings, have black venire persons. Accordingly, review by this Court is clearly warranted.

I. THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE EVEN ONE JUROR, IF DONE FOR RACIAL REASONS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. The Fifth Circuit decision affirming the district court's conclusion that the presence of two (2) blacks on a jury precluded petitioner from extablishing a prima facie case of racially discriminatory exercise of peremptory challenges directly conflicts with this Court's decisions in *Batson v. Kentucky,* 106 S.Ct. (1986) and *Edmondson v. Leesville Concrete Co.,* 111 S. Ct. 2077 (1991). It also conflicts with following circuit court positions: *Jones v. Ryan,* 987 F.2d 960 (3d Cir. 1993); *U.S. v. Joe,* 928 F.2d 99 (4th Cir. 1991), *cert. denied Baylor v. U.S. 112,* 112 S.Ct. 71, 116 L.Ed.2d 45, on remand 787 F.Supp. 548, *aff'd U.S. v. Skeeter,* 989 F.2d 496; *Splung v. Clark,* 960 F.2d 705 (7th Cir. 1992); *U.S. v. Bishop,* 959 F.2d 820 (9th Cir. 1992); and *U.S. v. Jiminez,* 983 F.2d 1020 (11th Cir. 1993). This square conflict warrants review by this Court.

2. In *Edmondson,* as in the present action, defendant used 2 of its peremptory challenges to remove black venire persons; the jury included 11 white persons and 1 black person. Plaintiff sought to have the defendant articulate a race neutral explanation for the exercise of its peremptory challenges, but the request was denied by the trial court. The jury returned a verdict on behalf of Edmondson, but it also determined that he was 80% at fault for the accident. Plaintiff appealed, and the Fifth Circuit held that this Court's holding in *Batson v. Kentucky,* 106 S.Ct. 1712, 1719 (1986), precluding the exercise of peremptory challenges to strike prospective jurors solely on the basis of race, applied with equal force to civil proceedings. In affirming the Fifth Circuit's decision in *Edmondson,* 107 S.Ct. at 2008, this Court stated:

Racial discrimination has no place in the court-

> room, whether the proceeding is civil or criminal. See *Thiel v. Southern Pacific Co.*, 328 U.S., at 220 66 S.Ct., at 985-86. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U.S.C. § 243; 28 U.S.C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially racially discriminatory challenges in a civil trial.

The case was remanded for further proceedings. If the presence of a black person on the jury precluded the establishment of a prima case of discriminatory use of peremptory challenges, there would have been no need for this Court to remand the case; there was one black person on the *Edmondson jury.*

3. In Jones v. Ryan, four black venire persons were called for voir dire. The prosecution exercised peremptory challenges to exclude 3 blacks, leaving one to serve on the jury. Speaking directly to the issue at hand, the court stated that "the mere presence of a single black on the jury would not prevent a finding of a prima facie case. 987 F.2d at 960. [citations omitted.]

4. The government in *U.S. v. Joe* used its peremptory challenges to exclude six blacks jurors, 5 from the panel and 1 alternate. Five blacks were seated on the jury. The de-
fendant moved to dismiss the juror, contending that the government used its strikes in a racially discriminatory manner. The district court denied defendant's motion, apparently on the basis that the presence of blacks on the

juror precluded a *Batson* violation. In rejecting the district court's conclusion, the Fourth Circuit stated that "a defendant is not automatically foreclosed from establishing a prima facie case of discrimination under *Batson* even when members of the defendant's racial group were seated." 928 F.2d at 102.

5. The Seventh Circuit's position is much more straightforward, finding a Fourteenth Amendment violation when the prosecutor exercises "even a single challenge if through that challenge he intentionally discriminates on the basis of race." *Splunge v. Clark*, 920 F.2d at 709. The fact that the percentage of blacks on the jury panel is equal to or greater than the percentage of blacks on the general venire does not, according to the position adopted by the Ninth Circuit, "offset a constitutional violation, thereby rendering the violation somehow harmless." *U.S v. Bishop*, 959 F.2d at 820. The Eleventh Circuit's position was clearly set forth in *U.S. v. Jiminez*, where the prosecutory employed 5 of his 7 challenges to exclude black males; 7 of the 12 jurors empaneled were black. This statistic, acccording to the court, "does not negate the possibility of race discrimination [.]" 953 F.2d at 1024.

6. Clearly, the position taken by the Fifth Circuit to the effect that the presence of blacks on a jury panel precludes the establishment of a prima facie case of racially discriminatory exercise of peremptory challenges conflicts with that of the Third, Fourth, Seventh, Ninth and Eleventh Circuits.

II. COUNSEL FOR DEFENDANTS' DEMEANOR IN RESPONDING TO THE DISTRICT COURT'S INQUIRY MANDATED A FINDING, PURSUANT TO *HERNANDEZ V. NEW YORK*, THAT THE PEREMPTORY CHALLENGE WAS EXERCISED IN A RACIALLY DISCRIMINATORY MANNER.

7. In *Hernandez v. New York*, 111 S.Ct. 1859, 1869 (1991), this Court stated that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race neutral explanation for a peremptory challenge should be believed. There will seldom be evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."

8. When asked to articulate the reasons for the exercise of his challenges, counsel for defendant responded in a manner clearly bespeaking of a racially discriminatory use of peremptory challenges: (a) he stated that he was not required to divulge such information to the court, and (b) he attributed objectionable traits and characteristics to a black juror when they were in fact possessed by two white jurors, who were allowed to serve on the jury.

9. The trial court's decision that counsel for defendant articulated nondiscriminatory reasons for the exercise of his peremptory challenges, and the Fifth Circuit's affirmance of that decision, conflict which this Court's decision in *Hernandez*, for "a discriminatory intent is inherent in [counsel's] explanation." 111 S.Ct. at 1866.

III. THE EXERCISE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK BUT NOT WHITE VENIRE PERSONS FOR TRAITS SHARED BY BOTH NEGATIVES A RACE NEUTRAL EXPLANATION.

10. It is significant for the court to consider the issue of "comparability," eg., whether the rejection of a black venire person for possessing qualities and traits similar to those possessed by a white venire person, but which do not result in the rejection of the white venire person, negatives a neutral explanaton. The Third and Eighth Circuits have concluded that it does: *Jones v. Ryan*, 967 F.2d 960 (3rd Cir. 1993); *U.S. v. Wilson*, 853 F.2d 606 (8th Cir. 1988). The Fifth Circuit's position is at odds with that of the third and Eighth Circuits for, in the instant case, it affirmed the trial court's finding that defendant's counsel gave race neutral reasons for his exclusion of black venire persons notwithstanding the fact that the traits ostensibly found objectional by counsel were in fact possessed by the white venire persons, who were not rejected.

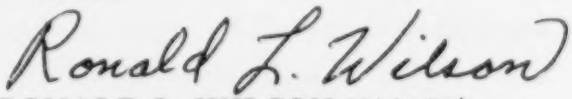
CONCLUSION

The position of the Fifth Circuit that the presence of blacks on the jury panel precludes the establishment of a prima facie case of racially discriminatory jury selection conflicts with that of this Court, the Third, Fourth, Seventh, Ninth and Eleventh Circuits. further, in affirming the trial court's determination that defendants' counsel gave a race neutral explanation for his peremptory challenges, the Fifth Circuit disregarded this Court's

unambiguous instruction in *Hernandez* that the best gauge of a "race neutral" explanation is the demeanor of counsel for defendant in exercising the challenges. Finally, the Fifth Circuit's failure two apply the test of "comparability" in determining whether counsel's articulation was pretextural conflicts with the position taken by several circuits, notably the Third and Eighth.

These are issues of national significance and, unless addressed by the United States Supreme Court, will recur with alarming frequency.

Respectfully submitted.



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February 28, 1994

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3093

JACQUELINE PADDIO,
Plaintiff-Appellant,

VERSUS.

BOARD OF TRUSTEES FOR STATE COLLEGES
AND UNIVERSITIES, et al,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(91-CV-4277-"N"(MAG 3))

Before VAN GRAAFEILAND,* SMITH, and WIENER, Circuit Judges. PER CURIAM:**

Having reviewed the briefs, record, and argument of

* Circuit Judge of the Second Circuit, sitting by designation.

** Local Rule 47.5.1 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that his opinion should not be published.

Counsel, we conclude that there is no error in the district court's determination that the defendants presented adequate reasons for their exercise of peremptory challenges and that those reasons were not pretextual. We also conclude that the district court did not err in entering judgment on the jury verdict. Accordingly, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JACQUELINE PADDIO, — CIVIL ACTION NO. 91-4277

v.

SECTION: "N" (3)

THE BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, ET AL,

JUDGMENT

This cause came on for trial before a jury on February 1, 1993. After hearing plaintiff's evidence, the Court granted the motion of defendant, Board of Trustees for State Colleges and Universities, for a judgment as a matter of law.

Considering the answers of the jury to the interrogatories propounded by the Court at the trial of this matter; and, further considering the direction of the Court as to entry of judgment; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Dr. G. Warren Smith, President, Southeastern University of Louisiana, Dr. Robert Butler, Vice-President for Institutional Development, Thomas Douple, Director of Athletics, and against plaintiff, Jacqueline Paddio, DISMISSING said plaintiff's complaint.

New Orleans, Louisiana, this 5th day of February, 1993.

/s/ LANCE M. APRICK

LANCE M. AFRICK
UNITED STATES
MAGISTRATE JUDGE

DATE OF ENTRY FEB. 8, 1993

white? I can't remember.

MR. WILSON: Yes, sir.

THE COURT: Okay. So your basis for saying that is notwithstanding the fact they left two blacks on the jury, is the fact that they cut three blacks during their peremptory - -

MT. WILSON: Right. The fact - -

THE COURT: - - challenge, is that correct?

MR. WILSON: They only had three peremptories.

THE COURT: Okay. Can y'all tell me the reasons why you - - Let's start with Ms. Beaulieu. Can y'all tell me the reasons why you struck Ms. Beaulieu?

MR. SEALE: Judge, in all due respect, I don't think it's appropriate for us to disclose to the court or to counsel why we chose to excuse to excuse a juror. I would like to point out in response to counsel's motion that we accepted two black jurors before we exercised any challenge for black jurors.

THE COURT: Well, I'm not saying at this point that he made a prima facie case but in the alternative under the *Baton* case the burden then shifts to you to articulate a race neutral explanation for striking the juror. So it is appropriate when I, ask, Do you want to go ahead and let me

know what the reason is for the challenges. So why don't you tell me why y'all struck Ms. Beaulieu. That was Juror number 6. You want me to raise her hand so you can see her again?

MR. SEALE: No; sir, I remember. We thought that Ms. Beaulieu's background and education and apparent level of sophistication was below what was needed to understand the issues in this particular case. She's a housewife. She's not been involved in the work force. She doesn't understand employment. She does not have any reason to understand the goal of higher education. And we felt like that that's not the kind of juror that we need in this case.

THE COURT: Okay. How about Juror number 7, Mr. Dugas?

MR. SEALE: We just didn't think that -- We thought the Mr. Dugas may very well turn out to be as plaintiff-oriented juror. He's an engineer. He's employed at Dixie Brewery. We felt like he may have a union affiliation or a pro employee orientation and affiliation.

THE COURT: Is he the one that filed the slip-and-fall civil case?

MR. WILSON: Right.

THE COURT: Huh? Is that correct?

MR. WILSON: No, he didn't file a case, he was a juror.

THE COURT: He was a juror.

MR. SEALE: He was a juror in a slip-and-fall

MRS. AUGUST: I'm Theresa August. I live in New Orleans. I'm married. I have five children.

THE COURT: Okay, And do you work

MRS. AUGUST: Sometimes, August Building Maintenance.

THE COURT: Okay. And what does your husband do, ma'am?

MRS. AUGUST: He's retired.

THE COURT: What did he do when he was working?

MRS. AUGUST: Janitoral supervisor.

THE COURT: Thank you.

MS. WEYSHAM: I'm Gale Weysham. I live in Slidell, Louisiana.

I work for Cablevision and I'm widowed. I do have three children.

THE COURT:Okay, When your husband was alive, what did he do, ma'am?

MS. WEYSHAM: New Orleans Police Department.

THE COURT: Okay. And let me mention one other thing to y'all. When you're addressing the court, please make sure - - and I should have told you this - - you tell us your number. Because otherwise talking. Okay?

Okay. Juror number 6.

MS. BEAULIEU: My jury number is 191. My name is Lorraine Beaulieu. I live in New Orleans, Louisiana. I'm semiretired. I work four hours a day for A.M.E. Janitorial Service.

THE COURT: Okay. Are you married, ma'am?

MS. BEAULIEU: No, I'm not.

THE COURT: Okay. Thank you.

Okay, Juror number 7, Mr. Dugas.

MR. DUGAS: Yeah. I'm Joe Dugas. I live at 1375 Aviators Street. I'm employed with Dixie Brewery and I'm a watch engineer.

THE COURT: I'm sorry, you're what?

MR. DUGAS: Watch engineer.

THE COURT: And you're married?

MR. DDUGAS: Single.

THE COURT: Single.

MR. DUGAS: Yeah.

THE COURT: Okay. Thank you.

Okay. Juror number 8.

MRS. BLANKE: My name is Geraldine Blanke. I live in Metairie at 4729 Southshore Drive and I have raised family. My husband is semiretired and was salesman.

THE COURT: Okay. Thank you.

Okay, Ms. Couvillion: My name is Gail Couvillion. I live in Metairie. I have three children. My husband is an air conditioning, heating electrical contractor and I'm does, and the name and address of your employee. Okay? Let's start with Mr. Sumrall.

MR. SUMRALL: I live in Folsom, Louisiana. I'm married. I have a wife. housewife. I'm retired.

THE COURT: You worked as a construction worker, is that correct?

MR. SUMRALL: I worked as a construction worker, right.

THE COURT: Okay, Thank you, Mr. Sumrall.

MR. SUMRALL: Thank you.

THE COURT: Okay. Mrs. Baldock.

MRS. BALDOCK: Baldock.

THE COURT: Okay.

MRS. BALDOCK: My name is Diane Baldock. I live in Harvey, Louisiana. I'm married. I have two grown sons and my husband is a sales engineer for Control Systems, Incorporated out of Jackson, Mississippi.

THE COURT: Okay. Thank you, ma'am.

Okay, Mrs. Batiste.

MRS. BATISTE: My name is Cindy Batiste. I live in Lacombe, Louisiana, I'm married. I'm employed with Allstate Insurance Company and my husband is a school bus driver.

THE COURT: Thank you.

Okay. Mrs. August.

With respect to Mr. Dugas, the defendants - - Dugas may have been pre-plaintiff's disposition, they should have - - in other words, if he thinks he has that they should have probed into it during voir dire examination. So to now raise that, it's too late in the game to now raise that as a reason for striking a juror. I simply asked counsel if there were any other questions that could be asked a juror at which point in time counsel indicated he had known. The time to raise the objection about bias of a juror is prior to the time the court selects the jurors and not at this stage right here.

And with respect to juror Mrs. Beaulieu, I don't find the issues to be so highly technical that Mrs. Beaulieu cannot been a witness in this case. I still submit that race was the motivating factor.

THE COURT: Anything else that you all want to respond?

MR. SEALE: Nothing.

THE COURT: Okay. I find that plaintiff has not made a prima facie showing that the peremptory challenges were based on race; there are two black jurors on the panel. And also based on the explanations given I don't find the challenges made were pretextual. So your *Batson* challenge, so to speak, is denied. Okay?

MR. WILSON: That's preserved for the record, is